

2008 WL 7022236 (Mich.) (Appellate Brief)  
Supreme Court of Michigan.

Shaun BONKOWSKI, Plaintiff-Appellant,  
v.  
ALLSTATE INSURANCE COMPANY, a foreign corporation, Defendant-Appellee.

No. 137672.  
November 13, 2008.

Court of Appeals No. 273945  
Oakland County Circuit Court No. 01-035172 NF

**Plaintiff-Appellant's Application for Leave to Appeal**

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**\*VI STATEMENT OF QUESTIONS PRESENTED****I**

**DID THE TRIAL COURT CORRECTLY AWARD PLAINTIFF NO-FAULT ATTORNEY FEES UNDER [MCL 500.3148](#)(1) AND DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT'S JUDGMENT WITH RESPECT TO SUCH FEES?**

The trial court answered..... “Yes”

The Court of Appeals answered..... “No”

Defendant-Appellee would answer..... “No”

Plaintiff-Appellant states the answer is..... “Yes”

## II

**IF IT IS DETERMINED ON THIS APPEAL THAT THE TRIAL COURT CORRECTLY AWARDED PLAINTIFF NO-FAULT ATTORNEY FEES, DID THE TRIAL COURT ERR IN FAILING TO AWARD PLAINTIFF ATTORNEY FEES AS CASE EVALUATION SANCTIONS UNDER [MCR 2.403](#) IN ADDITION TO ATTORNEY FEES UNDER [MCL 500.3148](#)?**

The trial court answered..... “No”

The Court of Appeals did not address this matter, as it ruled that Plaintiff was not entitled to attorney fees under MCL 500.3148

Defendant-Appellee would answer..... “No”

Plaintiff-Appellant states the answer is..... “Yes”

## \*VII III

**DID THE TRIAL COURT AND COURT OF APPEALS ERR IN FAILING TO RULE THAT 12% PENALTY INTEREST UNDER [MCL 500.3142](#)(3) CONTINUES TO ACCRUE UNTIL THE JUDGMENT ENTERED AGAINST DEFENDANT FOR OVERDUE BENEFITS IS SATISFIED?**

The trial court answered..... “No”

The Court of Appeals answered..... “No”

Defendant-Appellee would answer..... “No”

Plaintiff-Appellant states the answer is..... “Yes”

**\*1 STATEMENT OF FACTS**

Plaintiff Shaun Bonkowski sought personal protection benefits under the Michigan No Fault Automobile Insurance Act, [MCL 500.3101, et seq.](#), for expenses incurred following a catastrophic automobile-pedestrian accident which occurred on June 3, 2001. As a consequence of the accident, Plaintiff suffered a [spinal cord injury](#) which left him a quadriplegic and a [traumatic brain injury](#) ("TBI"). At the time of the accident, Shaun was an insured under a policy of automobile insurance with Defendant Allstate Insurance Company ("Allstate") and was therefore entitled to no-fault insurance coverage from Allstate. Although Defendant acknowledged its obligation to pay benefits, it failed to properly pay the benefits to which its insured was entitled. The only factual issues for the jury at trial in this action were the amount Allstate owed for allowable attendant care expenses for the care provided by Plaintiff's father, Andrew Bonkowski, to his son and the amount of no-fault interest due on overdue attendant care benefits. Trial began on June 28, 2006 and was concluded on July 7, 2006 with a unanimous jury verdict totaling \$1,730,723.67, including \$349,609.67 in no-fault interest.

The care that Andrew Bonkowski provides for his son Shaun Bonkowski is very highly skilled and multidisciplinary in nature. Mr. Bonkowski, though not licensed as a caregiver, is not merely some novice or semi-skilled care provider who is just struggling to do the best he can for his son. Shaun Bonkowski was transferred to Craig Hospital ("Craig") in Colorado, a facility nationally renowned for its expertise in taking care of patients like Shaun with both spinal cord and traumatic [brain injuries](#), for two reasons: (1) to allow Shaun to benefit from the institution's expert medical care; and (2) to train his father, who would accompany him there, to act as his caregiver. At Craig, Andrew Bonkowski would learn in intricate detail how to **\*2** provide the care that Plaintiff would require for the rest of his life from some of the best teachers in the world. There, Mr. Bonkowski was made an integral part of the team assigned to care for Shaun, including physicians, nurses, therapists, case manager and anyone else who had anything at all to do with Plaintiff's care. Andrew Bonkowski attended lectures given at Craig by some of the most knowledgeable physicians in the world in the area of [spinal cord injuries](#). Receiving extensive hands-on training from experts in each discipline of care Shaun's condition required, he has become extremely competent to perform every aspect of that multidisciplinary care Plaintiff requires on a 24-hour, seven days per week basis. Such training has enabled Mr. Bonkowski to more than meet his son's needs that would otherwise have to be met by an entire team of caregivers, including a high-tech licensed professional nurse (a high-tech "LPN" is an LPN who has had additional training and can handle more difficult patient issues, problems and care requirements) or registered nurse ("RN") who is skilled and experienced in caring for spinal cord patients (which skills not all LPNs or RNs possess), physical therapist, occupational therapist, respiratory therapist, and behavioral technician (Tr I, 173, 199, 210-216, 218-219, 221-224, 233, 241; Tr II, 30-32, 37-38, 81, 145-146, 154, 158-161, 172-174; Tr III, 6-8, 10-12, 14-15, 17-22, 32, 36-39, 60, 63-64, 72-74, 86-89).

The nature of the care that Mr. Bonkowski provides is discussed at length here to enable the reader to understand that there can be no question whatsoever that the jury's verdict regarding allowable attendant care benefits being owed and overdue is indisputably supported by the evidence, and why, under all of the circumstances, it is not possible that the trial court erred in awarding Plaintiff attorney fees under the No-Fault Act. Plaintiff's care requirements include not only skilled care provided by a high-tech nurse or registered nurse experienced in **\*3** caring for patients with [spinal cord injuries](#), but in addition regular attention from physical therapists, occupational therapists, respiratory therapists, and behavioral technicians. As will be discussed in greater detail below, Shaun's paralysis has resulted in a [neurogenic bladder](#) and bowel, meaning each is also paralyzed, which requires that he be catheterized every several hours to empty urine from his bladder to keep the bladder from becoming infected. Bowel movements are impossible for Shaun on his own and are accomplished through digital stimulation only, as provided by his caregiver. Another consequence of his paralysis is tightness and spasticity in his muscles, requiring frequent passive range of motion exercises and other techniques to keep muscle tone under control, and keep his legs especially from violently contracting, thrashing about and possibly tossing him out of his bed or wheelchair. Due to the [spinal cord injury](#), Plaintiff is also unable to cough and clear secretions on his own, is therefore prone to [pneumonia](#) and requires a caregiver to remove those secretions for him (Tr I, 137, 170-172; Tr II, 32-34, 160-161).

With regard to clearing and removing these secretions, Shaun's airway requires suctioning from time to time because he has no abdominal muscle function. The abdominal muscles are used to cough and free up phlegm or mucous. Since Shaun cannot do

that on his own, a tube must be inserted down into his windpipe and removal achieved by creating a vacuum through the tube. Usually performed by a respiratory therapist, it is performed by Mr. Bonkowski as required on an intermittent basis, with the frequency determined by listening to Plaintiff's lungs to detect the presence of excess fluid and observing his breathing effort. Properly handling this aspect of Shaun's care requires that the caregiver is intimately familiar \*4 with his patient and have a trained, skilled eye, as Andrew Bonkowski now certainly does (Tr I, 188-191; Tr II, 19-24).

Andrew Bonkowski was also trained at Craig to prevent Shaun from suffering the effects of skin breakdown by using proper padding, positioning and weight shifts. When a quadriplegic patient is in a wheelchair, care must be taken to position him properly to avoid putting excessive pressure on bony prominences of the patient's body. To provide adequate pressure relief, Shaun must be raised up and off such bony prominences every 15-30 minutes. His skin must be checked very carefully every time he is taken out of the wheelchair and put back into bed to make sure no skin problems develop. Even Plaintiff's clothing must be checked to make sure it is not binding anywhere, wadded up or otherwise cutting into his skin. Uncared for, even a mere abrasion can lead to skin breakdown, which can lead to infection, running down into the bone ([osteomyelitis](#)) if the tissue breakdown progresses deeply enough. Even while laying in bed, Shaun is only able to lay in one position for a maximum period of two hours, then has to be rolled from side to side, or onto his back. Repositioning Plaintiff at maximum intervals of two hours and ordinarily shorter periods must be done not only during the day, but also all through the night by his father (Tr I, 195-198; Tr II, 16-17, 57, 82-85; Tr III, 25-26).

Transferring a quadriplegic patient from bed to wheelchair, bed to shower chair, wheelchair to car, car to wheelchair and wheelchair to bed must be done with a similarly high degree of care. Andrew Bonkowski was taught these tasks in hands-on fashion at Craig by a physical therapist and became well aware that there are ever-present concerns about skin damage from excessive grip pressure, losing one's grip and dropping the patient (perhaps due to a sudden spasticity of the legs), or causing an injury to a joint by pulling too hard in the \*5 transfer process, concerns which are complicated by Shaun's 6'6" height and 188 lb. weight (Tr II, 25-28, 35-36).

In the area of care which would ordinarily fall within the domain of a physical therapist, Mr. Bonkowski was taught by such personnel at Craig to perform passive range of motion exercises to keep Shaun's muscles limber and prevent contractures (loss of full motion at a joint), as noted above. In Plaintiff's case, these exercises are performed by his father two times per day. Such techniques allow his son to keep and maintain the very limited use of his arms that he has, putting same to use in operating a control on his wheelchair, utilizing an instrument to tap on the keyboard of his computer and to feed himself using a fork with the assistance of a brace (Tr II, 32-34, 85-86).

Of extreme importance to the welfare of a quadriplegic patient such as Shaun Bonkowski are the matters of his bladder and [bowel care](#), functions he no longer has any control over himself. As to his bladder, Shaun has a [suprapubic catheter](#) which enters his belly below the navel and above the pubic line and goes right into his bladder, and is held in place with a balloon. Mr. Bonkowski maintains the catheter by flushing it, keeping it clean where it enters the area through Shaun's flesh and changing it under sterile conditions at regular intervals, being constantly aware that faulty technique may lead to damage to Plaintiff's tissues or the introduction of infection (Tr II, 39-42).

Plaintiff's fluid intake and excretion levels are also carefully monitored by Mr. Bonkowski to ensure mucous does not build up around the [bladder catheter](#). Shaun's bladder needs to be flushed out regularly to empty the mucous out of it, and Andrew Bonkowski does that with a syringe, pushing 60cc of sterile saline fluid in, pressing on the bladder a bit to agitate \*6 the mucous and urine content of the bladder, and allowing the [bladder to drain](#) into a bag. If Plaintiff's fluid intake is inadequate, mucous will plug the [bladder catheter](#) up, and if not promptly attended to, eventually cause the urine to back up into the kidneys, causing an infection. Through long-term experience and no small measure of dedication, Mr. Bonkowski can now determine with a degree of certainty whether Shaun's [bladder catheter](#) is plugged by monitoring his urine output and mentally comparing that volume to his fluid intake. If it is plugged up, he will flush the catheter out if possible, or change it if it cannot be adequately flushed (Tr I, 170; Tr II, 43-44, 51-52).

As a C5 level quadriplegic, Shaun Bonkowski doesn't sense when his bladder is full. There is thus a constant concern that his urine may back up into his kidneys. His caregiver must empty his bladder for him on a regular basis in order to keep the whole collecting system working well. Absent proper bladder management, such a patient may suffer from an over-distended bladder and consequent infections, [kidney failure](#) and ultimately death. Plaintiff's urine is collected in a bag and Mr. Bonkowski monitors it hourly, day and night, with regard to color, odor, quantity and consistency to determine whether there is a lot of mucous present in the bladder, whether there is an infection present and whether Shaun is taking in enough fluids (Tr I, 204-205; Tr II, 44-46, 126; Tr III, 6-8)

Similarly, Plaintiff does not sense when his bowel is full. His caregiver, Andrew Bonkowski, must therefore establish a predictable bowel program as a regular part of Shaun's home care to ensure full evacuation. Some patients require digital stimulation, which involves putting a glove on and inserting a finger into the rectum to stimulate that area, then inserting a suppository to stimulate the bowel to evacuate itself. This requires skilled care and must be \*7 performed on a daily or every other day basis to avoid constipation and a [bowel obstruction](#). The latter can lead ultimately to death, through a condition known as [dysreflexia](#), discussed at greater length below. After initially learning how to properly care for Plaintiff in this respect at Craig, Mr. Bonkowski, checking daily to see if feces are present in the bowel to be removed, has been able to train Shaun's bowel to respond to digital stimulation only, and medications in the form of suppositories are unnecessary. Plaintiff's stool characteristics have to be monitored in the same fashion as his urine to ensure his continued health and well-being (Tr I, 205, 207; Tr II, 16-18, 39-40, 58, 60-61).

At Craig, Andrew Bonkowski was also trained to attend to Plaintiff's occupational therapy needs. Occupational therapy is designed and intended to make the quadriplegic patient as independent as possible, and to enable him to feel he is of some use. In Shaun's case, it entails working with him to use his arms to perform the tasks he is capable of. Plaintiff, for example, loves using his computer, as it serves as his link to the outside world, and Mr. Bonkowski has learned how to facilitate his activities in this regard to allow Plaintiff as much interaction with that world as is practically possible. The **elder** Bonkowski has set up a checking account for his son, enabling him to make purchases online (Tr II, 36-37, 103-106, 129).

Shaun also depends upon his father to take care of every aspect of his personal hygiene, as he is completely unable to tend to himself in this regard. Andrew Bonkowski bathes him by giving him a sponge bathe in bed daily, and washes his hair by backing him up to the shower, tilting his wheelchair all the way back, washing and drying it, and tilting him back up. He also assists Plaintiff with eating, putting all of Shaun's food together in a special bowl, already cut \*8 up, so that he can poke at it with his fork. Mr. Bonkowski must of course hold the glass in order for his son to drink liquids (Tr II, 89-92).

The care that must be provided is difficult, even from a physician's standpoint, because the goal is not only to treat Plaintiff, but prevent further complications in his condition, including skin breakdown leading to the formation of [decubitus ulcers](#) and contractures and death itself. Death looms ever near from such causes as Shaun's inability to cough up or clear his secretions and possible development of [pneumonia](#) as a result. Plaintiff is also prone to a condition called [dysreflexia](#), as briefly noted above, it involves an uncontrolled rise in blood pressure, which if not timely noted and addressed by his caregiver, could easily result in a [stroke](#). Shaun's tendency towards developing [dysreflexia](#) at any time is due to the failure of the sympathetic nervous system when the spinal cord is damaged at levels of T6 or above. Many, many things may initiate [dysreflexia](#), including Plaintiff's urine not draining properly, a [urinary tract infection](#), [bowel obstruction](#), [decubitus ulcer](#), [ingrown toenail](#), [testicular torsion](#), uncontrolled spasticity, or any number of other seemingly innocuous conditions (Tr I, 173-175, 200).

With regard to the potentially fatal effects of [dysreflexia](#), Dr. Owen Perlman, a board-certified physiatrist who has served 17 years as medical director of the department of physical medicine and rehabilitation at St. Joseph Mercy Hospital and the single treating physician who is most knowledgeable concerning Plaintiff's care and treatment requirements, indicated that the first line of defense against same is the primary caregiver in the home or at the patient's bedside. That caregiver must be very highly skilled, to the point where he is able to recognize the issue in its developmental stages, determine the cause and provide immediate appropriate \*9 treatment. In Shaun Bonkowski's case, his caregiver and father, Andrew Bonkowski, has become quite adept at recognizing the initial symptoms of [dysreflexia](#) in his son and taking effective measures to contain the problem.

He monitors Shaun's blood pressure and *constantly* looks for signs and symptoms, such as complaints by Plaintiff of a thumping in his head or a flushing of his face with red splotches across Shaun's shoulders and chest, accompanied by a worsening of the thumping sensation (Tr I, pp 160-163, 165, 176-177, 217; Tr II, pp 46-48, 63, 159-161).

The demands made upon Andrew Bonkowski to attend to and care for his son's mental condition as a consequence of the June 3, 2001 accident are at least as daunting as the task of meeting Shaun's physical needs. At Plaintiff's counsel's request, psychiatrist Gerald Shiener met with both Shaun and his father and examined Plaintiff from a psychiatric perspective. Dr. Shiener is board-certified in psychiatry, licensed in Michigan, California and the United Kingdom and deals with [traumatic brain injury](#) ("TBI") and spinal cord patients on a continuous basis. Dr. Shiener is also deeply involved with a peer-driven group of physicians, physical therapists, occupational therapists, speech therapists, hospital administrators, neuropsychologists and psychiatrists who have formed an organization called the Commission on the Accreditation of Rehabilitation Facilities ("CARF"). CARF sets standards for in and outpatient programs for the rehabilitation of both spinal cord and TBI patients and certifies rehabilitation programs for hospitals and insurance companies. Dr. Shiener explained that just the fact that a quadriplegic patient is only eighteen, unable to move his limbs and confronted with the prospect of being in a wheelchair for the rest of his life is very difficult to accept and causes deep frustration and anger, resulting in significant behavioral problems, even in the absence of a [brain injury](#). The \*10 caregiver for such patients must be able to accept that anger, irritability, antisocial behavior and resistance to the care they require are simply part of the patient's illness and develop strategies to deal with their behavior when it becomes difficult. An 18-year-old patient has more difficulty dealing with the adversity his condition presents than does a 40-year-old. The younger patient receiving rehabilitation for a recent catastrophic injury has just had all of his hopes and expectations for his future effectively ended, has lived less of his life and faces a longer period of "confinement." Shaun Bonkowski's injury nearly coincided with his high school graduation, a time when plans for the future flourish. Plaintiff's TBI only compounded the behavioral problems that would be expected and made the task of caring for him from both a mental and physical standpoint much more difficult (Tr I, 200-201; Tr II, 149-150; Tr III, 33, 63; Tr IV, 4-13, 28-31, 35, 37-38).

Dr. Shiener's examination of Plaintiff revealed that Shaun was mildly to moderately depressed about his condition, a state of mind which prevailed regardless of the topic of conversation, and which reflected his damaged brain's inability to adequately deal with and control his feelings. Shaun basically felt that he couldn't do very much with his life and had to struggle mightily to have much of a life at all. He was socially withdrawn and easily frustrated by setbacks. His appetite and sleep patterns were disturbed to the point where Dr. Perlman felt they had to be addressed by medication. Shiener noted that there is a "pit" that Plaintiff and patients like him can fall into if their care providers aren't careful in how they deal with them. Shaun Bonkowski is kept out of this "pit" through his father's attention to providing structured activities and opportunities for interaction with other people, and setting goals and helping Shaun to work towards them. When Plaintiff overreacts to small setbacks, gets angry \*11 and seems to stay angry and be unable to move on to other things, a problem largely traceable to his TBI, Andrew Bonkowski knows how to approach Shaun, how to settle him down and how to "deflect" him past his initial angry reaction so that any task at hand can be addressed. Per Dr. Shiener, this task, with a quadriplegic patient also afflicted with a TBI, is every bit as important as meeting such a patient's physical care requirements (Tr IV, 24, 39-41, 44-48, 50).

In the very beginning, Plaintiff's [brain injury](#) made him a much more difficult patient to deal with--he was anxious, his memory was poor and he wasn't always interested in participating in the care he required. Mr. Bonkowski conquered these obstacles by always being there to reassure him, comfort him and remind Shaun that his care was something he had to do. Because of confusion and impairment of Shaun's ability to form concepts resulting from the TBI, Andrew Bonkowski was required to provide ongoing explanations to Plaintiff as to why certain things needed to be done. Those same difficulties render Shaun Bonkowski unable to direct anything with regard to his own care except the very simplest parts of it which have been thoroughly ingrained (Tr I, 202-203, 221; Tr II, 108, 112-113, 149; Tr III, 33, 63).

Because TBI patients adapt to changes in their daily routine in a very poor manner, it is also very important to have as much structure as possible in their life. "Structure" in this sense means that the patient knows what's going to happen--things in his environment are predictable. Continuity in the identity of their caregiver is extremely important. The fact that Andrew Bonkowski has always been Shaun's care provider, offering a closeness and familiarity with Plaintiff, has been a huge plus

in Plaintiff's life, making certain aspects of his care such as bowel and bladder programs much less humiliating than if the same tasks were performed by strangers. According to Dr. Shiener, Mr. Bonkowski has been a significant part of the \*12 considerable emotional adjustment Shaun has made and the fighting spirit that he has. If Plaintiff had been institutionalized, Shiener would not have expected to see the animation and emotional responsiveness he did indeed see in Shaun. Without his father being there as his caregiver, Plaintiff would have been more resigned to his fate and likely would have given up. Under Andrew Bonkowski's care and attention, Shaun has been able to thrive in a relative sense (Tr IV, 32-33, 58-61).

With a quadriplegic patient who also suffers from a [brain injury](#), Dr. Perlman explained that the caregiver must be extraordinarily well-trained, educated and vigilant, always being on the lookout for potential problems because any seemingly minor problem can quickly lead to a much greater one, with death always lurking in the background. Andrew Bonkowski accordingly is always evaluating his son when he is looking at him, since Mr. Bonkowski has learned that Shaun's appearance reveals a lot about his condition. Should Plaintiff not look quite right, his father immediately starts to investigate why. He has also found that it is necessary to monitor Shaun's emotional status and moods, as well as his physical condition, as the two may be interrelated. Mr. Bonkowski has come to know both the matters involved in his training at Craig and Shaun so well that his proficiency in caring for Plaintiff has risen well above the level of care trained nurses can ordinarily be expected to provide. On one occasion when Shaun was hospitalized after his discharge from Craig in a non-rehabilitation unit where the staff nurses lacked experience in caring for spinal cord patients, Andrew Bonkowski wrote a protocol of care for Plaintiff for the nurses to follow, which included turning Shaun, recognition of the signs and symptoms of [dysreflexia](#), the manner in which Plaintiff's bladder program should be performed and his positioning requirements to prevent skin breakdown. In addition, \*13 Mr. Bonkowski was at the hospital every day to perform Shaun's bowel program. While Andrew Bonkowski almost never leaves Plaintiff, on those rare occasions when his son must be left in the care of a properly trained RN, it is Mr. Bonkowski who must instruct the RN with regard to Shaun's specific needs and requirements during the time it is expected he will be gone. Even a well-trained, well-qualified professional nurse simply will not be aware of Plaintiff's particular needs and will not usually be able to offer Plaintiff the same high level of care that Andrew Bonkowski provides daily. On the two occasions when Shaun has been hospitalized since returning home from Craig, Andrew has found that the quality of nursing care provided to his son in that setting was inconsistent at best, and Mr. Bonkowski has continued to provide the care he requires even at the hospital (Tr I, 200, 209-210, 227-228; Tr II, 7-9, 58-60, 63, 99-100, 114-115, 152-157; Tr III, 4-5, 24-25).

Plaintiff provided evidence of the reasonable value of the care Andrew Bonkowski provides to Plaintiff at trial through testimony from Laura Kling and Robert B. Ancell. Laura Kling is an RN employed by Robert B. Ancell & Associates, a private rehabilitation company. Ms. Kling also is certified in case-management, rehabilitation nursing and life care planning. Life care planning includes everything that pertains to the care of the patient, including medical care, required equipment, medications, home modifications, diagnostic procedures, all other care and the cost of providing what the patient requires in every respect. She has been a certified case manager since 1993 and licensed in Michigan as a registered nurse since 1956. Kling is also a member of the Brain Injury Association of Michigan, an association of professionals working in the field of [traumatic brain injuries](#), and the Association of Spinal Cord Injury Nurses. She has been employed by Robert B. Ancell & Associates ("Ancell") as a case \*14 manager and life care planner since 1986, and has a wealth of experience with both spinal cord and TBI patients, as well as with patients suffering from both types of injuries. Kling was Shaun Bonkowski's case manager from July, 2001 until 2005, and kept Allstate and its representative, Jan Mainella, well informed not only on each aspect of Plaintiff's treatment and care requirements, but also of the fact that Andrew Bonkowski was providing virtually all of that care as Shaun's rehabilitation progressed. In addition, Allstate received all of Plaintiff's medical records and correspondence from Craig which specifically detailed the care Shaun was receiving from his father. There is no dispute, reasonable or otherwise, that Allstate was at all times well-advised of the fact that Mr. Bonkowski was providing highly-skilled, multidisciplinary care twenty four hours per day, seven days per week (Tr II, 133-144, 146-147; Tr III, 15-22, 34-37, 46-48, 61-62, 72, 103-104; Tr IV, 123-124, 129-136, 167-170, 176).

The base or minimum level of the highly skilled care that must be provided to Plaintiff on a continuous, 24-hour basis is that of a high-tech LPN or RN. Shaun Bonkowski's care prescription has called for that level of base care since his stay at Craig, and the multidisciplinary nature of his care requirements as discussed in great detail above also has not changed since

that time. The requirement for a high-tech LPN or RN has been constant because of the ever-present danger of death from [dysreflexia](#), a very real daily hazard which disqualifies anyone lacking experience in dealing with it from serving as Shaun's basic caregiver. A person meeting this skilled care requirement level must be with Plaintiff at all times, 24 hours a day, even when other care providers such as the various therapists or behavioral technicians are attending Shaun, since no physical, respiratory, occupational therapist or behavioral technician is qualified or able to deal with [dysreflexia](#) or other potential medical emergencies \*15 which may arise as a regular part of Plaintiff's daily life. Regular licensed practical nurses and nurse's aides are disqualified from serving as Shaun's caregiver for the same reason. Laura Kling testified that procuring a high-tech, licensed, practical nurse to supply Shaun's basic care needs would come at a reasonable cost of \$37.00 to \$40.00 per hour, while an RN would come at a cost of \$50.00/hour. In addition, the reasonable cost for a physical therapist, whose services Shaun requires on a regular basis and which have been provided to him by his father, would range from \$150.00 to \$300.00 for an hour visit. The Rehabilitation Institute of Michigan, which specializes in TBI and spinal cord patients, among others, charges \$240.00 to \$300.00 per visit on an outpatient basis. The cost of a behavioral technician to work with Plaintiff as Andrew Bonkowski does now to modify his behavior where some changes are desired or simply to help him deal with anxiety, memory problems, confusion and activities of daily living would be \$40.00 per hour. Neither high-tech LPN's nor RN's perform the physical, respiratory, occupational, or [behavioral therapy](#) which Shaun Bonkowski needs at regular intervals. The cost of such services cannot therefore be included in the costs of providing a high-tech LPN or RN to care for Shaun. The cost figures cited above with respect to the various care providers Plaintiff requires are based on Laura Kling's experience as a case manager and reflect the actual cost of obtaining these services in the health care marketplace (Tr I, 173, 221-224, 228, 240-243; Tr II, 163-167, 169-170, 172-174; Tr III, 16-17, 20-21, 28-30, 33-34, 37-39, 46-48, 50, 59-61, 65-66, 72, 104-105).

Robert B. Ancell is a vocational rehabilitation counselor and certified case manager in Southfield, Michigan. He has earned a Ph.D. in human services, involving disciplines which deal with human behavior, counseling, social work and sociology. Dr. Ancell's company, Robert B. \*16 Ancell & Associates, specializes in vocational rehabilitation and medical case management and has worked with spinal cord and TBI patients for 30 years. Consequently, Dr. Ancell is very familiar with the care such personnel as licensed practical nurses, registered nurses, physical therapists, occupational therapists, respiratory therapists and behavioral technicians provide for patients, as well as with the costs involved in procuring their services in the health care marketplace. He is also quite familiar with Shaun Bonkowski's case, the level of care Shaun requires and the care Andrew Bonkowski is and has been providing. Per Dr. Ancell, with a quadriplegic patient, not only must an experienced LPN or RN be there on a 24-hour basis, but other disciplines must be involved as well while the high-tech LPN or RN remains present. Included are the services of physical, occupational and respiratory therapists and behavior technicians. Mr. Bonkowski was providing not only the skilled level of care of a high-tech LPN or RN, but the multidisciplinary care of the physical, occupational, respiratory therapists and behavioral technician Plaintiff required also on a 24-hour per day, seven days per week basis. There is no single job title or occupation available which holds itself out to perform all the types of care Andrew Bonkowski is providing for his son. Multiple care providers would be required to replace him. Consequently, the cost of providing all of their services must be factored into any equation which is designed to calculate the reasonable value of Plaintiff's father's services. It must also be remembered that, by working around the clock seven days per week, Andrew Bonkowski is putting in the equivalent work week of more than three people each and every week (Tr III, 52, 55-57, 61-63, 68, 72-74, 85-89).

Per Dr. Ancell, the reasonable cost of a high-tech LPN in the health care marketplace, as it would be provided by agencies holding themselves out to supply such services when and \*17 where they are required is approximately \$40.00 per hour, straight time. Overtime work generally costs 50% more (time and a-half), or \$60.00 per hour, and there are also shift premiums for the afternoon and midnight shifts above and beyond the \$40.00/hr. rate. Because RN's receive more education and training, the base cost for an RN is approximately \$50.00 per hour, with the rate rising to \$75.00/hr. for overtime work. The cost for a physical or occupational therapist to come into the patient's home for what is generally a one-hour visit is \$125.00 per hour, and if a second session is needed later in the day, another charge for \$125.00 is thereby generated and incurred. A respiratory therapist costs \$75.00 per visit, which also generally involves one hour of the therapist's time. The reasonable charge for a behavioral technician ranges from \$40.00 to \$85.00 an hour, depending on the degree and complexity of the behavioral problems that must be dealt with, which relate directly to the sophistication level of the therapist which will be required (Tr III, 68-71, 74-78, 106, 109-110).

Defendant Allstate Insurance Company (“Allstate”) introduced no expert testimony regarding the reasonable value of Andrew Bonkowski’s services in the healthcare marketplace. Per the stipulation of the parties, Allstate was permitted to have Jan Mainella testify as to how she determined that \$19.00 per hour was what would be paid for Plaintiff’s father’s services. Mainella is a claims adjuster for Allstate. Shaun Bonkowski’s claim was referred to her for handling shortly after the accident occurred on June 21, 2001 and Ms. Mainella authorizes and oversees the attendant care payments on Plaintiff’s file to Andrew Bonkowski. While there are different levels of authority for a claims adjuster at Allstate, Mainella has as much authority as there is to have and can pay any amount with regard to a claim (Tr IV, 76-79, 100-101, 103-104).

**\*18** Mainella has no medical background or education herself—her only college degree was in political science. She is neither a nurse nor an expert in nursing, and readily conceded that both Laura Kling and Robert Ancell were far more knowledgeable and qualified to discuss the nursing industry than she was. Mainella also candidly admitted that she was not an expert in determining the value of attendant care, and would have to rely on other persons to assist her in placing the appropriate value on such care, as she would be unable to do it herself. Allstate does business nationwide and had the ability to contact nurses, physicians and medical review companies to assist Mainella in this task. Indeed, Jan Mainella acknowledged receiving and reading Laura Kling’s 8/14/01 letter advising her that Mr. Bonkowski would be providing care in the category of a high-tech LPN and that the reasonable cost of such services from an accredited, certified agency was \$37.00 to \$40.00 per hour. Mainella admitted that those figures told her what it would cost Allstate to have someone come in and perform that care if Andrew Bonkowski did not do so, but did not consider Kling’s letter at all in making a determination of the value of Mr. Bonkowski’s services (Tr III, 16-17, 46; Tr IV, 104-107, 115-124).

Rather than take advantage of the vast assortment of resources available to her to ascertain the value of the care Mr. Bonkowski was providing to his son, Ms. Mainella limited her efforts in this regard to a very cursory reference to a text entitled “The Homecare Salary & Benefit Report, 2001-2002,” published by the Hospital and Health Care Compensation Service in Oakland, New Jersey. To calculate the rate of compensation Andrew Bonkowski would receive for his care-giving efforts, Jan Mainella merely totaled the average hourly rates of pay for an ordinary [not high-tech] LPN, a high-tech-LPN and a registered nurse and averaged them to **\*19** come up with a figure of \$19.01 per hour. Rounding downward, Allstate began paying Mr. Bonkowski \$19.00/hr. in November, 2001. Mainella had not made anything resembling a complete study of the contents of this book, knew nothing about the methodology it employed and did not even know whether averaging averages as she had done would lead to a skewed result. She also admitted she had no real knowledge of what the caregivers whose rates she averaged together could actually do or provide in terms of patient care, and didn’t feel that knowledge was necessary. In this regard, it is interesting to note that despite Mainella’s awareness that it would be medically unacceptable to have only an ordinary LPN or home health aide with Plaintiff in his home because of the inability of these lesser-skilled caregivers to handle the medical emergencies such as [dysreflexia](#) that could be expected to arise, she included the hourly rate for an ordinary LPN in her calculations anyway, contrary to Plaintiff’s physicians’ prescriptions, because she personally believed that some of the care Shaun received could be performed by an LPN. She was also well aware that inclusion of the hourly rate for the inadequately-skilled LPN would have the effect of bringing the average rate she had calculated as appropriate for Mr. Bonkowski down (Tr IV, 85-89, 127, 132, 139-141, 143-144, 146-147, 170-171).

Allstate was at all times aware that Andrew Bonkowski was providing the equivalent care of various essential therapists and technicians *in addition to* that of a high-tech LPN or RN, who were not qualified for such tasks. Rather than pay for the fair value of such care, however, Allstate preferred to consider this additional care as simply part and parcel of the **elder** Bonkowski’s hourly rate of \$19.00/hr., and paid him no additional compensation whatsoever for these services. Quite conveniently, Allstate did not actually investigate what it would cost in **\*20** the healthcare marketplace to replace all of the services Mr. Bonkowski was actually rendering for Shaun’s benefit and welfare. The only rationale Defendant could offer at trial for its failure to compensate Mr. Bonkowski for these additional services was that: (1) Andrew Bonkowski was not licensed as a physical or occupational therapist; and (2) Jan Mainella didn’t believe it was her job to determine exactly what kind of care he was providing for Shaun. As to the former, Mainella admitted that Plaintiff’s father had been trained by therapists to perform the care Plaintiff required and that Mr. Bonkowski did not need to be licensed to do so. With regard to the latter, she simply preferred to calculate

his hourly rate based on the nurses' rates that were available in the single book/report she saw fit to employ (Tr I, 234-236, 240-241; Tr IV, 89-90, 129-138, 156, 158-159, 164-170, 173-174, 179, 184).

While Mainella initially attempted to justify her decision to compensate Plaintiff's father as she had based upon correspondence between herself and Dr. Perlman, wherein Perlman had indicated that if Andrew Bonkowski didn't have the credentials of an LPN or RN he should not be compensated at that level, she conceded as did Dr. Perlman himself that Perlman was not qualified to give an opinion as to the amount Mr. Bonkowski should receive as Plaintiff's caregiver (Tr I, 234-236, 240-241; Tr IV, 89-90, 174).

While Allstate also never, ever paid Mr. Bonkowski even a dime of overtime, despite Defendant's knowledge that he was caring for Shaun twenty-four hour a day, seven days a week, with no vacation time or holidays, Mainella grudgingly acknowledged that these caregivers would typically receive time and a half for overtime, double-time for weekends and additional shift differentials for midnight shifts and/or holidays, and that if Andrew Bonkowski wasn't working all three shifts with Plaintiff, Allstate would have to pay a lot more to supply \*21 him with equivalent care. Mainella had to admit that her own, single reference source indicated that the average pay for an RN for the second shift and third shifts was \$35.47 and \$44.33/hr. respectively, with \$42.28-\$52.33/hr. being the range of earnings for an LPN and RN for the weekend shift. The same book/report provided for an additional \$2.00 per hour in the event the caregiver was required to be "on call." None of the above was taken into consideration by Allstate in determining Andrew Bonkowski's rate of compensation (Tr III, 69-71, Tr IV, 89, 93, 141, 150-156).

The verdict form agreed upon by the parties consisted of only two basic questions: (1) "What is the amount of allowable expenses owed to the Plaintiff? Include only expenses not already paid by Defendant;" and (2) "Was payment for any of the expenses or losses to which the Plaintiff was entitled overdue? If your answer is 'yes/ what is the amount of interest owed to the Plaintiff on overdue benefits, including only interest not already paid by the Defendant." The jury was also instructed that Plaintiff was entitled to 12% interest on any benefit which was found to be overdue, i.e., not paid within 30 days after reasonable proof of the fact and amount of the loss was provided to Allstate. Returning a unanimous verdict in favor of Plaintiff, the jury found that Allstate owed Plaintiff \$1,381,114.00 in allowable expenses not already paid and \$349,609.67 in interest on overdue benefits (Tr IV, 185, 199-200, 212, 223, 228; Tr V, 13-16).

Judgment in Favor of Plaintiff Pursuant to the Verdict of the Jury was entered by the lower court on July 13, 2006, providing that judgment enter in Plaintiff's favor in the amount of \$1,730,723.67, with Plaintiff being further entitled to taxable costs, attorney fees and interest, including any sums to which Plaintiff was entitled under the Michigan No-Fault Act, the Revised \*22 Judicature Act and the Michigan Court Rules, including case evaluation sanctions, as later determined by the circuit court (Exhibit "A").

On or about July 21, 2006, Plaintiff filed his Motion for Costs, Case Evaluation Sanctions and Calculation of Interest, seeking both no-fault attorney fees pursuant to [MCL 500.3148](#) and case evaluation sanctions, including attorney fees under [MCR 2.403\(0\)](#), as Plaintiff had accepted and Defendant had rejected the case evaluation award of \$150,000.00 in this action. The motion was heard and taken under advisement by the trial court on August 2, 2006 (8/2/06 trans., p 16).

On September 6, 2006, the circuit court, while granting Plaintiff attorney fees under the No-Fault Act, denied the request for case evaluation sanctions, including attorney fees, ruling that same would constitute "double-dipping" in a manner precluded by [McAuley v General Motors Corp.](#), 457 Mich 513; 578 NW2d 282 (1998).

On or about September 18, 2006, Plaintiff presented his proposed Order Granting in Part and Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions and Calculation of Interest and Entry of Judgment. The proposed order included a provision that no-fault interest under [MCL 500.3142\(3\)](#) should continue to accrue after the July 13, 2006 judgment was entered until Allstate had paid the benefits the jury had found to be overdue and satisfied the judgment (See 10/4/06 trans., pp 3-5). Defendant Allstate opposed this provision, contending that when the jury awarded expenses and no-fault interest and the verdict was incorporated into a judgment, the matter of the benefits being overdue was resolved and concluded (9/25/06 Objections of

Defendant Allstate to Plaintiff's Proposed Order Denying Motion for Judgment Notwithstanding the Verdict and/or New Trial and Order Granting in Part and \*23 Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions and Calculation of Interest and Entry of Judgment, p 4). The trial court ruled that it would order that the 12% penalty interest under [MCL 500.3142](#) would continue to run until the date of the verdict on July 7, 2006, when the jury found Plaintiff entitled to \$349,609.67 in interest on overdue benefits and simply let the appellate courts decide if such interest continues to accrue beyond that point (10/4/06 trans., p 4).

On October 4, 2006, the circuit court entered its Order Granting in Part and Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions, No-Fault Sanctions and Calculation of Interest and Entry of Final Judgment (Exhibit "B"). This order included the lower court's denial of case evaluation sanctions to Plaintiff pursuant to *McAuley* and limited interest to that provided for under [MCL 600.6013](#).

Defendant Allstate filed its Claim of Appeal on or about October 24, 2006, contending that the trial court had erred in denying its motion for judgment notwithstanding the verdict ("JNOV"), in awarding Plaintiff no-fault attorney fees and with respect to the amount of attorney fees awarded.

On November 7, 2006, Plaintiff filed his Claim of Cross-Appeal, alleging the trial court erred in failing to award Plaintiff attorney fees as case evaluation sanctions in addition to attorney fees under the No-Fault Act, in failing to order that 12% penalty interest under the No-Fault Act would continue to accrue until the judgment against Defendant was satisfied and that Plaintiff was entitled to attorney fees on appeal under [MCL 500.3148](#) and [MCR 7.216\(C\)\(1\)\(a\)](#).

On October 2, 2008, the Court of Appeals issued its opinion, ruling that the trial court properly denied Allstate's motion for JNOV; that the circuit court erred in awarding no-fault \*24 attorney fees to Plaintiff for the reason that Defendant had established that its initial refusal to pay Plaintiff's caregiver the amount of compensation sought for his services was based on a bona fide dispute with regard to the amount due under the No-Fault Act; that no-fault interest continued to accrue only until the entry of the judgment, rather than until the judgment was satisfied; and that the matter would be remanded to the circuit court to determine whether Plaintiff was entitled to case evaluation sanctions pursuant to [MCR 2.403](#) ("Exhibit "C").

Plaintiff now seeks leave to appeal on the basis that the Court of Appeals erred in ruling that Plaintiff was not entitled to no-fault attorney fees; that the lower appellate court erred in finding that 12% penalty interest on overdue benefits continued only until entry of the judgment, rather than the time the judgment was actually satisfied; and on the basis that Plaintiff is entitled to case evaluation sanctions in addition to no-fault attorney fees where, as here, the two provisions serve independent policies.

## \*25 ARGUMENT I

### THE TRIAL COURT CORRECTLY AWARDED PLAINTIFF NO-FAULT ATTORNEY FEES UNDER [MCL 500.3148\(1\)](#) AND THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S JUDGMENT IN THIS RESPECT

#### A. STANDARD OF REVIEW

Absent clear error, the appellate courts will not reverse a trial court's finding regarding an unreasonable refusal or delay in paying personal protection insurance benefits under the No-Fault Act. Clear error exists when a reviewing court is left with the definite and firm conviction on the entire record that a mistake has been made. *Proudfoot v State Farm Mut. Ins. Co.*, 254 Mich App 702; 658 NW2d 838 (2003), affirmed in part, vacated in part on other grounds, 469 Mich 476; 673 NW2d 739; *Grand Valley Health Center v Amerisure Ins. Co.*, 262 Mich App 10; 684 NW2d 391 (2004).

#### B. ARGUMENT

All of the testimony in this action had established that Mr. Bonkowski had been extensively trained by some of the best teachers in the world at Craig Hospital, a nationally renowned institution in caring for patients with spinal cord and [traumatic brain injuries](#), and was consequently very highly skilled in providing every aspect of the care Shaun required. The care given by Andrew Bonkowski was multidisciplinary in nature and included that not only of an RN or high-tech LPN, but also the same care that would have been provided by physical, respiratory and occupational therapists and a behavioral technician. Allstate was kept informed at all times of the multidisciplinary, highly-skilled nature of the care the [elder](#) Bonkowski was providing for the benefit of his son and specifically advised from a highly respectable source that the value of that care exceeded \$40.00/hr. at least as early as 8/14/01 (Tr IV, 119-123). \*26 However, Jan Mainella, Allstate's claims adjuster, testified that she determined that it would be appropriate to pay Mr. Bonkowski just \$19.00/hr. on a straight time basis for the care he provided 24 hours per day, seven days per week, year after year, with no overtime pay ever given or considered, no paid holidays, no "on-call" pay differential for the time he was required to care for Plaintiff through the night, no pay increases over time and no fringe benefits of any kind. Mainella purportedly based her determination on "The Homecare Salary & Benefit Report, 2001-2002," published by the Hospital & Health Care Compensatory Service in Oakland, New Jersey in cooperation with the National Association for Home Care. She did so by averaging the base hourly pay in Michigan for a high-tech nurse (\$22.80 per hour), a registered nurse (\$19.57) and a licensed professional nurse (\$14.67) (Tr I, 173, 199, 210-216, 218-219, 221-224, 233, 241; Tr II, 30-32, 37-38, 81, 141-146, 154, 158-161, 172-174; Tr III, 6-8, 10-12, 14-22, 32, 34-39, 46-48, 60-64, 72-74, 86-89, 103-104; Tr IV, 86-89, 123-124, 129-136, 168-170, 176).

Even the notion that Andrew Bonkowski was being paid \$19.00/hr. is deceiving, because that figure is based purely on straight time, with no overtime or shift premiums ever being paid. If it is considered that even based on Jan Mainella's testimony that Mr. Bonkowski would have been entitled to overtime, that \$19.00 figure translates to *just \$14.25/hr. as his base rate* (\$19.00/hr. x 24 hours = \$456.00/day. With overtime, there are 32 units of pay per day [one for each of the first 8 hours, and 1.5 for each of the following 16 hours for time and a half, or overtime]. Dividing \$456.00 by 32, the base rate comes to \$14.25/hr., for serving as not one *but five* highly skilled caregivers for a quadriplegic, [brain-injured](#) patient).

\*27 The very same text Mainella had relied on to pay Mr. Bonkowski just \$19.00/hr. straight time was unequivocally shown by Plaintiff's trial counsel on cross-examination of Ms. Mainella to have established that the same caregivers whose rates Mainella averaged would typically receive shift premiums, on-call pay increases, fringe benefits, holiday pay and increases in their pay over time to raise their actual compensation package well above their base hourly rates. That same report indicated that the caregiver would receive an additional sum per hour to work an "off shift," or to be on call. Registered nurses received an average of \$35.47 per hour for working the second shift and \$44.33 an hour for the third shift, an enormous increase over the stated base hourly rate of just \$19.57/hr. Similarly, weekend shift premiums brought the weekend shift averages to \$42.28/hr. and \$52.33/hr. for LPNs and RNs respectively. They had also received regular increases in their base rate of pay from 1994 to 2001, representing cost of living increases. The text also established that care providers usually receive such fringe benefits as paid holidays, and excused paid absences, including sick, personal, death and family leave and vacation time, benefits which were valued at an additional 22.02% of their base pay rate. While Allstate admitted that it would have paid these extra amounts to keep professional caregivers in the Bonkowski home as necessary, it never paid them to Andrew Bonkowski. Further, this report recognized that in addition to nursing care rates, the standard pay for a single visit by an occupational therapist was \$49.31 and \$50.06 for a physical therapist. Despite its knowledge that Mr. Bonkowski was performing each of these tasks daily *in addition to* providing the requisite base level of care that a high-tech LPN or RN would supply, Allstate didn't consider similar compensation for Plaintiff's father (Tr IV, 148-158, 160-161).

\*28 When confronted with her failure to even consider any of these additional forms of compensation for Mr. Bonkowski, added dollars of pay which even her own source clearly indicated such caregivers would typically receive, Mainella could only flatly state that "I have determined that I feel that \$19 an hour is a reasonable rate" (Tr IV, 159, 161).

The trial court not only heard but was inundated with the testimony of not only Laura Kling and Dr. Ancell, but also Mainella's testimony as discussed above concerning the fair value of the services Allstate was well aware Andrew Bonkowski was performing. *By every account, that value was well in excess of the minimal compensation Allstate was determined to pay.* The

Court of Appeals thus clearly erred in concluding that “It appears from the record that the trial court only considered the jury’s conclusion that Andrew was entitled to greater compensation than that offered by Defendant to award attorney fees to Plaintiff. Thus, we are left with a definite and firm conviction that the trial court simply based its conclusion on the jury’s verdict. This was error” (10/2/08 Opinion, pp 9-10). Clear error sufficient to reverse a trial court’s finding regarding an unreasonable refusal to pay personal protection insurance benefits under the No-Fault Act requires a review of *the entire* record before the reviewing court may conclude that a mistake was made, *Roberts v Farmers Ins. Exchange*, 275 Mich App 58; 737 NW2d 332, 338 (2007). As stated in *46th Circuit Trial Court v County of Crawford*, 476 Mich 131; 719 NW2d 553, 559 (2006) with respect to review for clear error in general,

“A finding is ‘clearly erroneous’ if ‘the reviewing court, *on the whole record*, is left with the definite and firm conviction that a mistake has been made’ ” (emphasis added).

**\*29** In accord, *Federated Publications v City of Lansing*, 467 Mich 98; 649 NW2d 383, 388 (2002). On this record, there was abundant evidence to support the trial court’s decision with regard to no-fault attorney fees.

Defendant’s dedicated disregard for providing reasonable compensation to Plaintiff’s father and determination to simply pay the minimum amount it felt it could get away with for his care is also well-demonstrated elsewhere in the record. After having his acute care needs initially addressed at St. Joseph Mercy Hospital, Jan Mainella recommended that Plaintiff go to a downriver facility called “Kindred,” a sort of sub-acute setting which supposedly did rehabilitation work with patients and could deal with some acute care issues. Laura Kling, Shaun’s case manager, went to this facility to investigate its capabilities, talked with as many people there as possible and actually attended therapy sessions there. She came away far less than impressed and felt the facility was completely inappropriate for Shaun, as it did not offer either [spinal cord injury](#) or traumatic [brain injury](#) rehabilitation. Indeed, Kindred did not leave her with a good feeling at all. Instead of sending Plaintiff to Kindred as Allstate wished, Kling and Mr. Bonkowski decided between themselves that Craig Hospital, which was well-known for its ability to address both Shaun’s TBI and [spinal cord injury](#), was where he needed to be (Tr II, 145-149). There should be little question that as Kindred offered far less than Craig in terms of quality of care, it would have been significantly cheaper than the nationally renowned Colorado institution, leading to the inevitable conclusion that Allstate’s desire to minimize its costs, even at the expense of Plaintiff’s health and welfare, was first and foremost on Defendant’s agenda. Still other portions of the record established that proper payment of benefits appeared not to be on Allstate’s list at all.

**\*30** Mainella was well aware that the prescriptions from Plaintiff’s treating physicians called for a 24-hour caregiver who had sufficient skill to deal with the ever-present threat of death from [dysreflexia](#), such a high-tech LPN or RN. Andrew Bonkowski had this capacity beyond question, as a result of the intensive training program he had gone through at Craig. Yet Mainella decided to factor in the hourly rate of a regular LPN, whom she was aware could not meet Shaun’s prescribed requirements for care, in determining the compensation Mr. Bonkowski would receive because Mainella, with admittedly no expertise whatsoever in the area, personally believed in direct contrast to the treating doctors that some of the care that was being provided could be performed by someone with lower levels of skill. Mainella was of course well aware that including the basic hourly pay rate for such a person (\$14.67/hr.) would substantially reduce the figure she would arrive at in computing an hourly rate for Andrew Bonkowski (Tr IV, 139-140, 143-146).

With the record replete with evidence establishing that Defendant Allstate’s real objective was to minimize payment of benefits and where *every* source indicated that the amount Allstate desired to pay was well below the amount constituting fair and reasonable compensation for Mr. Bonkowski’s services, the Court of Appeals erred in ruling that Defendant’s refusal to pay additional compensation was based upon a bona fide and legitimate dispute over the compensation due under the No-Fault Act (10/2/08 Opinion, pp 10-11). In fact, Allstate’s actions stand in stark contrast to its statutory obligations in this matter.

An insurer is responsible under [MCL 500.3107\(1\)\(a\)](#) for all personal protection insurance benefits arising out of “allowable expenses.” Per the statutory text, allowable expenses consist of “all reasonable charges incurred for reasonably necessary products, services and **\*31** accommodations for an injured person’s care, recovery or rehabilitation. If litigation results from

an insurer's unreasonable refusal to pay benefits or delay in making proper payment, attorney fees are awardable under [MCL 500.3148](#), which provides:

“An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making the proper payment.”

Personal protection insurance benefits are considered overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained, [MCL 500.3142\(2\)](#).

Based on the discussion of Allstate's conduct above, it is clear that the Defendant failed to act in good faith in determining the proper and reasonable amount of compensation which was due Andrew Bonkowski as Plaintiff's caregiver. Instead, Allstate **abused** the **elder** Bonkowski as much as it could, because it felt it could, for as long as it could, forcing Plaintiff and Mr. Bonkowski to accept an amount which was indisputably well below what even the source Defendant saw fit to rely upon indicated was proper, or litigate the matter. The jury obviously agreed with this assertion, based on its finding that proper payment for benefits was not made within 30 days after reasonable proof of the fact and amount of the loss was provided to Allstate and its award of interest for overdue benefits in the amount of \$349,609.67 (Tr V, 14).

“Good faith” is a primary factor for consideration in determining whether the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment, *\*32 Goble v Auto-Owners Ins. Co.*, 428 Mich 51; 404 NW2d 199, 206 (1987). An insurer acts unreasonably when it bases its refusal to pay or make proper payment on personal beliefs which are not grounded in fact or are in conflict with the advice of the injured person's treating physicians. *Tennant v State Farm Mut. Auto. Ins. Co.*, 143 Mich App 419; 372 NW2d 582, 587-588 (1985). Where the insurer simply makes a policy decision to deny the claim for benefits without a reasonable evaluation thereof, such a denial is unreasonable and warrants an award of attorney fees under the No-Fault Act's penalty provisions, *McKelvie v Auto Club Ins.*, 203 Mich App 331; 512 NW2d 74, 77 (1994). Also, where all of the actual facts relevant to the claim are known and in the hands of the insurer, yet the insurer persists in clinging to the most tenuous basis to deny the claim and refuse proper payment, the intent to unreasonably withhold payment is established, and attorney fees under [MCL 500.3148](#) are properly awarded. *Grand Valley Health Center v Amerisure Ins. Co.*, 262 Mich App 10; 684 NW2d 391, 400-401 (2004).

Based on this record, the trial court cannot be said to have clearly erred in awarding attorney fees for Allstate's outrageous failure to properly pay the benefits to which Plaintiff was entitled in the case at bar. For the reasons stated above, the Court of Appeals' decision is clearly erroneous and will cause material injustice.

### **\*33 ARGUMENT II**

**IF IT IS DETERMINED ON THIS APPEAL THAT THE TRIAL COURT CORRECTLY AWARDED PLAINTIFF NO-FAULT ATTORNEY FEES, PLAINTIFF ASSERTS THAT THE TRIAL COURT ERRED IN FAILING TO AWARD PLAINTIFF ATTORNEY FEES AS CASE EVALUATION SANCTIONS UNDER [MCR 2.403](#) IN ADDITION TO ATTORNEY FEES UNDER [MCL 500.3148](#)**

#### **A. STANDARD OF REVIEW**

The interpretation and application of court rules and statutes presents a question of law that is reviewed de novo, *McAuley v General Motors Corp.*, 457 Mich 513; 578 NW2d 282, 285 (1998).

**B. ARGUMENT**

The trial court in the instant action granted Plaintiff's request for attorney fees under [MCL 500.3148](#), but denied his request for attorney fees under [MCR 2.403\(0\)](#) on the basis that granting the request for such additional fees would constitute "double-dipping," which the Supreme Court had deemed improper in [McAuley v General Motors Corp.](#), 457 Mich 513; 578 NW2d 282 (1998) (9/6/06 trans., pp 6-7). In this, the trial court clearly erred. If, as Plaintiff contends, he is entitled to no-fault attorney fees under the circumstances of this case as set forth in Argument I, Plaintiff is also entitled to attorney fees under the court rule.

*McAuley*, *supra*, held that where the purposes of court rules and statutes providing for an award of attorney fees serve independent policies, recovery under *both* may well be appropriate, citing [Howard v Canteen Corp.](#), 192 Mich App 427; 481 NW2d 718 (1991) and [Kondratek v Auto Club Ins. Ass'n.](#), 163 Mich App 634; 414 NW2d 903 (1987). *McAuley* ruled under its own facts that an award of attorney fees under the Handicappers Civil Rights Act, [MCL 37.1101 et seq.](#), and attorney fees under [MCR 2.403\(0\)](#) as case evaluation sanctions were \*34 duplicative and impermissible because both provisions were compensatory only, being intended to relieve prevailing parties or plaintiffs of the reasonable costs of all or part of the litigation. The Court emphasized that neither provision imposed attorney fees as a penalty, 578 NW2d 285, 287, and that where the prevailing party had already been fully reimbursed for reasonable attorney fees under the Handicapper's statute, there were no "actual costs" remaining to be reimbursed under the court rule, 578 NW2d 287. [Rafferty v Markovitz](#), 461 Mich 265; 602 NW2d 367 (1999) similarly ruled that *where there was no support in the provisions of either the statute or court rule that attorney fees may be imposed as a penalty*, an award of attorney fees under the statutory provisions of the Civil Rights Act, [MCL 37.2802](#), served to compensate plaintiff for the reasonable attorney fees she had incurred in the action. Plaintiff thus had no remaining "actual costs" for which she could claim compensation under the mediation court rule. See also [Grow v W.A. Thomas Co.](#), 236 Mich App 696; 601 NW2d 426 (1999), holding that where the purpose of the statute serving as the basis of an attorney fee award (there the Civil Rights Act) was compensatory rather than punitive, awarding attorney fees under both the statute and [MCR 2.403\(0\)](#) would result in the plaintiff being impermissibly compensated twice. *Bonkowski* is in a materially different posture, however, as an award of attorney fees under [MCL 500.3148](#) is specifically intended to operate as a penalty, based upon the culpable conduct of the insurer.

There is no question that the provision for attorney fees set forth in [MCL 500.3148](#) is intended as a penalty. [McKelvie v Auto Club Ins.](#), 203 Mich App 331; 512 NW2d 74, 77 (1994) stated that section 3148(1) is a "penalty provision... [enacted] to ensure prompt payment to the insured." [Combs v Commercial Carriers, Inc.](#), 117 Mich App 67, 72-73; 323 NW2d 596 (1982) \*35 held that attorney fees assessed under [MCL 500.3148\(1\)](#) are mandatory, contingent only upon culpable conduct on the part of the insurer. [MCL 500.3148\(1\)](#) provides in pertinent part that:

"An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

In contrast, the policy behind the case evaluation sanction rule, [MCR 2.403\(0\)](#), is to place the burden of litigation costs upon the party who insists upon trial by rejecting a proposed case evaluation award, *Howard v Canteen Corp.*, *supra*, at 481 NW2d 726; [Taylor v Anesthesia Associates of Muskegon, P.C.](#), 179 Mich App 384; 445 NW2d 525, 526 (1989). Although one of the aims of the case evaluation rule is to discourage needless litigation, *the rule is not intended to punish litigants for asserting their right to a trial on the merits.* *McAuley*, *supra*, at 578 NW2d 287. Its compensatory, non-punitive purpose is well reflected in the terms of its provisions and the absence of any requirement for unreasonable or culpable conduct as a condition for an award of costs: **“(O) Rejecting Party's Liability for Costs.**

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

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(6) For purposes of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.”

Sanctions under [MCR 2.403\(0\)](#) are mandatory, *Sanders v Monical Machinery Co.*, 163 Mich App 689; 415 NW2d 276 (1987).

Under circumstances such as those of the case at bar, Plaintiff is entitled to an award of attorney fees as case evaluation sanctions under [MCR 2.403\(0\)](#) in addition to the attorney fees awarded under section 3148 of the No-Fault Act under the rule stated in *McAuley*, *Howard v Canteen Corp.*, and *Kondratek*. In that portion of its opinion that is directly applicable in this case, *McAuley* stated:

“However, we also agree with the prior decisions of the Court of Appeals that hold that where the purposes of the court rules and statutes providing for an award of attorney fees serve independent policies, recovery under both may be appropriate. See, e.g., *Howard v Canteen Corp.*, 192 Mich App 427; 481 NW2d 718 (1991), and *Kondratek v Auto Club Ins. Ass'n.*, 163 Mich App 634; 414 NW2d 903 (1987). While we neither indorse nor condone the result reached in those cases, we acknowledge that independent policies and purposes may serve to allow a party double recovery” (at 578 NW2d 286).

*Kondratek* thus controls the result that must be reached in the case at bar. It stated:

\*37 “Defendant contends that an award of attorney fees under both the statute [[MCL 500.3148](#)] and court rules [[MCR 2.403\(0\)](#)] constitutes a double recovery for a single element of damages, and improperly allows plaintiff a windfall. We disagree. The award of attorney fees under the No-Fault Act serves a purpose separate and distinct from that served by awarding fees under the mediation court rule. The attorney fees awarded under the No-Fault Act represent a *penalty* for an insurer's unreasonable refusal or delay in making payments. It is clear that the purpose of the penalty provision is to insure that the injured party is promptly paid. *Darnell v Auto-Owners Ins. Co.*, 142 Mich App 1; 369 NW2d 243 (1985). In comparison, the policy behind [MCR 2.403\(0\)](#) is to place the burden of litigation costs upon the party who insists upon trial by rejecting a proposed mediation award. *Bien v Venticinque*, 151 Mich App 229; 390 NW2d 702 (1986). Therefore, because each provision serves an independent policy and purpose, recovery of fees under both provisions may be appropriate...” (at 414 NW2d 906).

Based on the discussion of the evidence presented at trial in Plaintiff-Appellee's Brief on Appeal, incorporated herein by this reference as though fully set forth, it is readily apparent that Defendant Allstate was properly *penalized* for an unreasonable delay in making proper payment by an award of attorney fees under [MCL 500.3148](#) by the trial judge. Defendant also did not make any offers of settlement before trial and rejected a case evaluation award of \$150,000.00 in this action which Plaintiff accepted. Under all of the circumstances of this matter, where the case could have been resolved for a fraction of the amount eventually awarded after trial, it is clear that Defendant should also be made to bear the burden of the \*38 litigation costs its rejection of the case evaluation generated. Plaintiff respectfully submits that the decision of the trial court is clearly erroneous and will cause material injustice under the facts and circumstances of the case at bar, conflicts with the established case law of this state and involves an issue of major significance to the state's jurisprudence.

**\*39 ARGUMENT III****THE TRIAL COURT AND COURT OF APPEALS ERRED IN FAILING TO RULE THAT 12% PENALTY INTEREST UNDER MCL 500.3142(3) CONTINUES TO ACCRUE UNTIL THE JUDGMENT ENTERED AGAINST DEFENDANT FOR OVERDUE BENEFITS IS SATISFIED****A. STANDARD OF REVIEW**

Questions of law are reviewed de novo, *Christiansen v Gerish Tp.*, 239 Mich App 380; 608 NW2d 83 (2000).

**B. ARGUMENT**

On or about September 18, 2006, Plaintiff presented his proposed Order Granting in Part and Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions and Calculation of Interest and Entry of Judgment. The proposed order included a provision that no-fault interest [under MCL 500.3142(3)] should continue to accrue after the July 13, 2006 Judgment in Favor of Plaintiff Pursuant to the Verdict of the Jury was entered until Defendant Allstate had paid the benefits the jury had found to be overdue and satisfied the judgment (See 10/4/06 trans., pp 3-5). The trial court ruled that it would order that the 12% penalty interest under MCL 500.3142 would continue to run until the date of the verdict on July 7, 2006, when the jury found Plaintiff entitled to \$349,609.67 in interest on overdue benefits (7/7/06 trans., p 14), and simply let the appellate court decide if such interest continues to accrue beyond that point (10/4/06 trans., p 4). The Court of Appeals opined that once a judgment was entered, post-judgment interest was limited to the six percent interest provided for under MCL 600.6013(8). The lower appellate court reasoned that continued penalty interest under the No-Fault Act on an unsatisfied \*40 judgment for overdue benefits would represent an unauthorized judicial enhancement of the substantive damages found by the jury. Under the law of this state, Plaintiff submits that no-fault interest should and does continue to accrue at the rate of 12% per annum until the judgment is satisfied.

MCL 500.3142(2) provides that personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. Under subsection (3) of the statute, an overdue payment bears simple interest at the rate of 12% per annum. The statutory text does not include any limitation as to the time during which interest continues to accrue. In construing a statute, a court must not read into it provisions which the legislature did not see fit to include, *Ford Motor v Unemployment Compensation Comm'n.*, 316 Mich 468, 473; 25 NW2d 586 (1947); *Alexander v Employment Sec. Comm'n.*, 4 Mich App 378, 383; 144 NW2d 850 (1966). Rather, the courts must consider the purpose of the statute and the harm it is designed to remedy, applying a reasonable construction which best accomplishes that purpose. *Patrick v Shaw*, 275 Mich App 201; 739 NW2d 365, 371 (2007); *People v Gubachy*, 272 Mich App 706; 728 NW2d 891, 893 (2006). No-fault interest is awarded as a penalty for the insurer's misconduct in failing to timely pay a claim for benefits supported by reasonable proof of loss, *Regents of the University of Michigan v State Farm Mutual Insurance Company*, 250 Mich App 719; 650 NW2d 129, 138 (2002); *Williams v AAA Michigan*, 250 Mich App 249; 646 NW2d 476, 483-484 (2002). Considering the legislative intent of the statutory provision, it should be axiomatic that where the insurer has denied payment and forced a plaintiff to litigate the right to recover benefits, eventually obtaining a judgment for same, the benefits which have been incorporated into that judgment \*41 remain overdue and continue to draw interest under MCL 500.3142 until the judgment is actually satisfied. And indeed, such was the law in the state of the law in Michigan until the Court of Appeals issued its published opinion in the case at bar.

In *Johnston v DAIIE*, 124 Mich App 212; 333 NW2d 517 (1983); *Iv den* 417 Mich 1100,26, the court unequivocally held that no-fault interest continued to accrue at 12% until a judgment for overdue no-fault insurance benefits was *satisfied*. After noting the holding of *Wood v DAIIE*, 99 Mich App 701, 709; 299 NW2d 370 (1980); *affmd* 413 Mich 573, 589-590; 321 NW2d 653 (1982) that six percent judgment interest under MCL 600.6013 was intended to compensate the prevailing party for the expenses incurred in bringing an action and for the delay in receiving money damages, while the provision for 12% interest under MCL 500.3142(3) was intended to *penalize* a recalcitrant insurer, rather than compensate the claimant, *Johnston* ruled

that the plaintiff was entitled to both judgment interest under [MCL 600.6013\(2\)](#) and no-fault interest pursuant to [MCL 500.3142](#) until the judgment was *paid*:

“Consequently, plaintiff is entitled to the following interest on his overdue no-fault personal protection benefits: interest at 12% per annum from the time his benefits became overdue on December 12, 1978, until the day before he filed his complaint on February 23, 1979; interest at 18% per annum from February 23, 1979, until June 1, 1980; and interest at 24% per annum from June 1, 1980, *until the judgment is satisfied*” (at 124 Mich App 215; emphasis added).

The ruling of *Johnston* is in accord with that of [Wood v DAIIE](#), 413 Mich 573, 589-590; 321 NW2d 653 (1982) that the interest provisions contained in [MCL 500.3142](#) and [MCL 600.6013](#) \*42 are not mutually exclusive, and an award of interest under both provisions was proper. Per *Wood*, at some risk of redundancy,

“The purpose of the six percent interest statute [MCL600.6013] is to *compensate* the prevailing party for the expenses incurred in bringing an action and for the delay in receiving money damages. [Schwartz v Piper Aircraft Corp.](#), 90 Mich App 324, 326; 282 NW2d 306 (1979); [Waldrop v Rodery](#), 34 Mich App 1, 4; 190 NW2d 691 (1979). The 12 percent interest provision [MCL 500.3142] is intended to *penalize* the recalcitrant insurer rather than compensate the claimant...”(at 413 Mich 589, fn. 17; emphasis original).

*Wood* did not, as the Court of Appeals contends in the instant action (10/2/08 Opinion, p 13), limit 12% interest under the No-Fault Act to 14 months under the facts of that case. Rather, the *Wood* opinion simply states that “the default judgment awarded plaintiff consisted of \$11,708.93 in wage-loss benefits for 14 months and interest [thereon] at 12%...In addition, plaintiff received 6% interest on the entire judgment” (at 413 Mich 577). There is no indication in *Wood* that an award of penalty interest should terminate at any time before that portion of the judgment representing overdue benefits is actually satisfied. *Johnston* did not, as the lower appellate court contended, misapply *Wood*'s holding to extend the penalty interest rate under [MCL 500.3142\(3\)](#) to the satisfaction of judgment (10/2/08 Opinion, p 14). See also [Shanafelt v Allstate Ins. Co.](#), 217 Mich App 625; 552 NW2d 671, 679 (1996), noting that a plaintiff may recover both statutory and penalty interest, citing *Wood*, *supra*

The Court of Appeals' conclusion that the general rule of merger of judgments extinguishes Plaintiff's claim for 12% penalty interest even though the judgment remains unsatisfied and the \*43 benefits remain overdue is premised upon the Court's contention that such interest is a substantive element of the damages suffered by Plaintiff (10/2/08 Opinion, p 12). However, the Court of Appeals failed to cite any case authority for its contention in this regard, citing only Michigan Standard Jury Instruction M Civ JI 35.04 and related question 9 to Michigan's Standard Verdict Form, M Civ JI 67.01. The jury's function in this context, however, is merely to make the factual determination as to whether no-fault first party benefits were overdue, and if so, to calculate penalty interest to the date of its verdict. Neither the jury instruction nor the related question purport to indicate either in form or in substance that the assessment of such interest as a penalty for the insurer's unreasonable failure to timely pay benefits is intended to be extinguished at any time before a judgment entered thereon is actually *satisfied*. Instead, the jury's finding merely provides the factual basis for a continued assessment of the penalty as long as it may be applicable.

It is noteworthy that the Court of Appeals failed to cite even a single case in support of its proposition that Plaintiff's claim for penalty interest on overdue benefits which continue to be overdue was extinguished by the general rule of merger of judgments. Plaintiff submits that those cases dealing with the doctrine in the context of claims which are continuing in nature make it evident that the rule would not encompass such a situation. Plaintiff's claim for penalty interest is in the nature of a continuing wrong for each day that the overdue benefits remain unpaid by the insurer. Allstate's obligation with respect to such benefits is not at an end *until the benefits are paid*. In 50 GS, Judgment, sec. 766, pp 320-321, the authors state:

“...[A] former judgment constitutes no defense to a cause of action accruing, between the same parties and on the same subject matter, *after* its rendition...”

\*44 Thus, res judicata does not bar claims arising from ongoing misconduct that extends or occurs after the first suit.

In addition, it has been held that res judicata does not apply to bar an independent claim of part of the same cause of action where the case involves a continuing or recurrent wrong” (emphasis added).

Michigan has traditionally treated claims which are of a continuing nature as being unaffected by the doctrine of merger. See, for example, *Plaza Inv. Co. v Abel*, 8 Mich App 19, 27; 153 NW2d 379 (1967), holding that a covenant to keep the premises in repair throughout the term of a lease is capable of constant or continuous breach and the fact that damages have been recovered for breach of such a covenant in a prior action will not bar a second suit seeking damages suffered from the continuing breach since the last recovery. Similarly, in *Love v Flitcraft*, 149 Mich 149; 112 NW 735 (1907), the plaintiff sued for two payments alleged to be due under a contract. The second payment was held not to be recoverable on the pleadings because it was not yet due when the action was filed. Accordingly, the claim for the second payment was withdrawn from the jury and judgment rendered in plaintiff's favor for the first payment. Love held that the judgment did not preclude a second action to recover the second payment. *Near v Donnelly*, 93 Mich 460; 53 NW 616 (1892) ruled that in an action for an installment of interest against the defendant by a subscriber to a fund for the erection of a hotel, where the hotel was built by the defendant from monies placed into the fund under an agreement to pay each subscriber interest yearly on his subscription, a decree in a former action between the same parties granting a lien on the hotel property for the interest then due did not work a merger of claims for interest subsequently falling due under the agreement.

**\*45** Defendant Allstate's contention in the case at bar that when the jury awarded expenses and no-fault interest and the verdict was incorporated into a judgment in Plaintiff's favor, the matter of the benefits being overdue was resolved and concluded (9/25/06 Objections of Defendant Allstate to Plaintiff's Proposed Order Denying Motion for Judgment Notwithstanding the Verdict and/or New Trial and Order Granting in Part and Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions and Calculation of Interest and Entry of Judgment, p 4) is thus contrary in all respects to the governing law. Implicit in Allstate's argument is the notion that judgment interest under [MCL 600.6013](#) is exclusive after a judgment has been entered, a notion long ago dispelled by *Wood*, *supra* and *Johnston*, *supra*. No-fault penalty interest at 12% per annum accrues independently of judgment interest and continues until Allstate actually pays the overdue benefits and satisfies the judgment entered against it. Plaintiff therefore respectfully submits that the decision of the Court of Appeals is clearly erroneous and will cause material injustice, conflicts with the established law of this state under *Wood* and *Johnston*, *supra*, and presents an issue which is of major significance to this state's jurisprudence.

#### **\*46 RELIEF**

WHEREFORE, Plaintiff-Appellant Shaun Bonkowski prays this Honorable Court enter its order granting his application for leave to appeal, reversing the judgment of the Court of Appeals and reinstating that of the trial court with regard to the award of attorney fees in favor of Plaintiff under the No-Fault Act, awarding Plaintiff attorney fees as case evaluation sanctions under [MCR 2.403](#) in addition to attorney fees awarded to Plaintiff under the No-Fault Act in an amount to be determined by the trial court, providing that 12% penalty interest under [MCL 500.3142](#) continues to accrue until the judgment for overdue attendant care benefits under the No-Fault Act is actually satisfied and awarding Plaintiff-Appellant the reasonable and necessary costs and attorney fees incurred with regard to the instant application for leave to appeal.